

JUL 1 1968

IN THE
United States Court of Appeals
For the Ninth Circuit

MARGIE J. ELLIOTT and LON ELLIOTT,
wife and husband,
Appellants,

v.

ALPAC CORPORATION, a Nevada Corporation,
d/b/a GLASER BEVERAGES,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

APPELLANTS' PETITION FOR REHEARING

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The court's opinion dated May 30, 1968, is bottomed upon two associated findings:

(1) That, as Mr. Smith was not aware whether appellee used a claw-like mechanism to secure the cap on the bottle, the predicate for his opinion was conjectural; and

(2) That, "it was clearly established that, in fact, there is no claw-like *or crimping mechanism* in its bottling process and that the 'crimps' in the cap are a part of the cap manufacturing process" (emphasis supplied).

In response to the first finding, appellants respectfully

submit that the predicate for Mr. Smith's opinion is that pressure exerted in the capping process produced the defects in the bottle. The crucial physical fact to Mr. Smith was not the precise nature of the mechanism used to cap the bottle, but the fact that pressure was required for the capping.

Thus, Mr. Smith stated:

"The clamping pressures of the capping machine exert certain forces. The bottle is designed to withstand those forces normally. The capper goes down, seats the cap, and it has some claws that crimp the cap under the seal ring which is under the cap making it necessary to expand the cap to take it off. Those forces are of a certain range, and the bottle is normally designed to take those forces if the capping machine is working. Now, when one introduces and finds on the bottle scratches in the surface, it goes without question that in an annealed piece of glassware, that the surface, that the strength is weakened by the same analogy that the glazier weakens this piece of glass with a diamond tool or a hardened steel point, puts in scratch, and weakens it so that it can be broken, and that crack will follow, hopefully at least, along the scratch that he has put in, and this weakness is material depending upon where the pressure point comes with respect to the scratch. Here we have a pressure point due to the pressure of the capper, the crimping of the cap, the scratches that are adjacent, and stresses are set up here in a weakened condition also" (Tr. 145-146; emphasis supplied).

"The significance is that measures of abnormally high conditions in the capping machine could have produced it, if the bottle were weak, and it is in the case here, with scratches, that normal crimping pressures would tend to produce, greatly more tend to produce splitting of the bottle, opening up of the bottle along the scratch line because of the weakness" (Tr. 147; emphasis supplied).

In response to this court's second finding, appellants respectfully submit:

(1) That the finding is factually erroneous because a crimping mechanism was indisputably used in the capping operation; and

(2) That the evidence relating to crimping and capping abundantly establishes the predicate for Mr. Smith's opinion, i.e., that pressure was exerted in capping the bottle.

Thus, Mr. Duncan, appellee's production superintendent, testified:

"Q. With respect to placing the cap or crown on the bottle, at one point or another *it has to be crimped* to get over that ring at the top of the bottle and to seal it so that air can't get in; is that correct?"

"A. Yes, sir.

"Q. Could you explain to the jury how that is accomplished?"

"A. That is done by that flexible throat as we call it that comes down over the bottle, and as it comes down it gives a little, away from the bottle, it will tighten the crown on to the bottle.

"Q. It tightens the crown?"

"A. *It crimps the skirt* as we call it, the flareout skirt" (Tr. 275; emphasis supplied).

"Q. Excuse me. If it is flexible, it does mean that there is pressure applied?"

"A. Yes, *there is pressure to the skirt applied to the skirt of the crown*, to fold it down around the crowning ring as we call this" (Tr. 279; emphasis supplied).

"Q. What did you mean when you said that it squeezed the skirt of the cap or something? Explain to the jury what you mean by that.

"A. That is to form this flare around this crowning

ring, and as this passes down, like that (indicating), *it will come down under pressure on to the cap.*

“THE COURT: *How many pounds of pressure, if you know?*”

“THE WITNESS: Well, on the first operation there is a foot that goes through here that holds this crown on which is around 400 pounds, and as this crowning head comes on, *there is exerted between 700 and 800 pounds* from a spring up in the crowning that is pushing this down” (Tr. 280; emphasis supplied).

CONCLUSIONS

As evidence of substantial probative value was presented to establish all physical facts essential to Mr. Smith’s opinion, it is submitted that it is the function of the jury to determine the value to be placed upon that opinion.

The expert witnesses agreed that there was extensive cracking underneath the cap of the bottle (Tr. 290); that the breakage of the bottle emanated from two crack lines (fractures) beginning beneath the cap and progressing downward (Ex. A-2; Tr. 144, 286, 326); and that the breakage of the bottle was not caused by a blow (Tr. 328), or any other type of impact (Tr. 149-150, 154, 289, 328).

Under these circumstances, appellants submit it is manifest that it is a jury’s province to determine factually whether or not pressure exerted in the capping operation produced the cracking, fracturing and breakage.

Accordingly, it is further respectfully submitted that appellant, Margie J. Elliott, a seriously and permanently

disabled woman, is entitled to a reconsideration by this court of its decision, and to an order by this court remanding the case to the trial court for submission to a jury on the warranty issue.

Respectfully submitted,

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Attorneys for Appellants

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rule 23 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing petition is well founded and that it is not interposed for delay.

I also certify that this petition has been served on all adverse parties herein.

ROBERT O. WELLS, JR.

of Attorneys for Appellants

